No. 87-942

Supreme Court, U.S.
FILED
FEB 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DON R. SPEER,

Petitioner,

—vs.—

OTTAWAY NEWSPAPERS, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GIBSON, DUNN & CRUTCHER
ROBERT D. SACK
Counsel of Record
STUART D. KARLE
200 Park Avenue
47th Floor
New York, New York 10166
(212) 351-4000

Attorneys for Respondent
Ottaway Newspapers, Inc.

Of Counsel

CHARLES BUCHANAN
1105 East 32nd Street, Suite 5
Post Office Box 1582
Joplin, Missouri 64802
(417) 623-8220

February 27, 1988

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the rule set forth in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny that a public figure plaintiff in a libel action must show that those individuals having responsibility for the publication of an allegedly defamatory editorial had actual malice as a matter of law forbids the imputation to a corporate defendant of the actual malice of an employee who was a source for an allegedly defamatory editorial, but who had no responsibility for its publication.

2. Whether the principle reaffirmed by this Court in *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984), that courts make an independent examination of the whole record in libel actions by public figures to ensure that liability is found only when the plaintiff has proved actual malice by clear and convincing evidence deprives a public figure plaintiff of his Seventh Amendment right to a jury trial.

TABLE OF CONTENTS

PAGE

COUNTERSTATEMENT OF QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

COUNTERSTATEMENT OF THE CASE 1

A. Summary of the Factual Record 1

B. Decisions Below 3

REASONS FOR DENYING THE WRIT 4

I. The Courts Below Correctly Applied Settled Principles Of Constitutional Law In Determining That Petitioner Failed To Show "Actual Malice" By Clear And Convincing Proof 5

II. The Courts Below Correctly Followed Principles Established By This Court And Searched The Record For Evidence of Actual Malice 10

CONCLUSION 11

TABLE OF AUTHORITIES

Cases PAGE

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) . 5, 10

Bandelin v. Pietsch, 98 Idaho 337, 563 P.2d 395, *cert. denied*, 434 U.S. 891 (1977) 9

Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 (1984) .....i, 5, 10

Cantrell v. Forest City Pub. Co., 419 U.S. 245 (1974).. 7

Dupler v. Mansfield Journal Co., Inc., 64 Ohio St. 2d 116, 413 N.E.2d 1187 (1980), *cert. denied*, 452 U.S. 962 (1981) 9

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)..... 4

Herbert v. Lando, 441 U.S. 153 (1979) 6

Hustler Magazine, Inc. v. Falwell, No. 86-1278 (U.S. February 24, 1988)..... 4

Lane v. Arkansas Valley Publishing, 675 P.2d 747 (Colo. Ct. App. 1983), *cert. denied*, 467 U.S. 1252 (1984)... 9

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) .....i, 4, 5, 6, 11

St. Amant v. Thompson, 390 U.S. 727 (1968)..... 5, 9

Time, Inc. v. Pape, 401 U.S. 279 (1971)..... 5

Treatises

Restatement (Second) of Agency (1958)..... 8

Seavey, *Agency* (1964)..... 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-942

DON R. SPEER,

Petitioner,

—VS.—

OTTAWAY NEWSPAPERS, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

A. Summary of the Factual Record

This lawsuit is about the publication of an editorial ("the editorial") on April 26, 1983 in *The Joplin Globe*. *The Globe* is a daily newspaper published by respondent, Ottaway Newspapers, Inc. ("Ottaway"), through its Joplin Globe division in Joplin, Missouri.[1]

---

1 The following information concerning respondent is provided pursuant to Rule 28 of the Rules of this Court. Ottaway is a wholly owned subsidiary of Dow Jones & Company, Inc., and is affiliated with Telerate Inc.

The editorial commented on the brutal manner in which a reporter for *The Globe*, Max McCoy, was arrested by petitioner, a police officer, while he was reporting on a demonstration in front of a bar late on a Saturday afternoon. Immediately after McCoy had been arrested, a *Globe* photographer had arrived at the scene and spoken with witnesses who told him that excessive force was used to arrest McCoy. That evening, editors of *The Globe* twice interviewed McCoy at the newspaper's office about the incident. At each interview McCoy's story was the same: he told his editors that petitioner, without provocation, had kicked and kneed him after knocking him to the ground in the middle of the street. McCoy also showed his editors his dented camera and bruises on his body. McCoy went to the hospital that night for treatment of his injuries. The editors testified at the trial that they believed McCoy's story, and that they knew McCoy to be an honest reporter, well-behaved on assignments.

After being interviewed by his editors, McCoy went home. He did not write an article about the incident.

The *Globe* editors assigned another reporter to cover the story of McCoy's arrest. That reporter looked at records at police headquarters, returned to *The Globe*, and wrote a story that appeared the next day, Sunday. The story included quotations of McCoy about how petitioner and other police officers handled him. It also included a statement from police officials on the arrest.

On Monday, the day after *The Globe* published the news article and two days after McCoy's arrest by petitioner, *Globe* staffers continued to investigate the McCoy arrest. Two phone calls to the paper—the only two calls *Globe* staffers recalled receiving—supported McCoy's account of the incident.

On Monday, the editorial page editor of *The Globe*, Robert Cooper, who had learned of the arrest from the Sunday story in the newspaper, asked his colleagues whether McCoy's statements in the Sunday story were accurate. They replied that they still believed McCoy. Cooper then drafted an editorial about the incident.

When McCoy returned to work that evening, Cooper and other members of the *Globe* news staff interviewed him about the arrest. His account was consistent with his prior accounts of events.

Cooper brought a copy of the draft editorial to the meeting with McCoy and the other editors. McCoy did not read the draft of the editorial at the meeting, or any later draft at any time before the editorial was set to be printed in the paper; did not make any suggestions as to what the editorial should say; did not play any role in Cooper's decision to write an editorial; and did not play any role in the decision of the editors of the paper to publish the editorial on the opinion page of *The Globe*. McCoy was simply a source of information.

The factual account in the editorial was thus based on McCoy's report of the incident, the personal belief of those who had responsibility for publishing the editorial in McCoy's reliability as a source of facts and in his passive and peaceable personality, the visible physical injuries he sustained, the damage to his camera, the medical treatment he received, another reporter's on-the-scene interviews, the investigation of the reporter of the news story, including her visit to police headquarters and her story published in Sunday's *Globe*, public reaction to that story, particularly supporting telephone calls, the absence of a complaint from petitioner or anyone in the Joplin Police Department as to the accuracy of the Sunday news article, and more generally the failure of any information contradicting the account to be brought to the attention of the *Globe* officials responsible for publication of the editorial.

B. Decisions Below

The petitioner brought a diversity action solely against the corporate publisher of *The Globe* in the United States District Court for the Western District of Missouri. McCoy's accounts of the arrest concededly, for purposes of this response, could have been found by the jury to have been made even though he knew they were false or had subjective awareness of their probable falsity. The petitioner did not seek to recover against the

reporter or the publisher for the reporter's accounts, however. The petitioner also did not seek to recover for the factual account of the arrest contained in the newspaper. The jury returned a verdict for the petitioner on the editorial alone. The District Court granted respondent's motion for a judgment n.o.v., holding the petitioner had failed to meet his constitutional burden of showing that any member of the *Globe* staff having responsibility for the publication of the editorial had a subjective awareness of probable falsity in publishing it. That decision was unanimously affirmed by a panel of the Court of Appeals for the Eighth Circuit.

REASONS FOR DENYING THE WRIT

The petition neither raises any important question of federal law that must be decided by this Court or that was decided by the courts below in conflict with decisions of this Court nor shows any conflict among the circuit courts on any issue decided below. In fact, the courts below correctly applied settled constitutional principles to a highly unusual situation in which recovery was sought on the basis of factual statements in an editorial where a newspaper employee having no responsibility for the editorial's publication was the primary source for the factual allegations in the editorial.

As a public official, petitioner, to recover damages, had to show by clear and convincing proof that those having responsibility for the defamatory publication had "actual malice," *i.e.*, they either knew it was false or had a "subjective awareness of probable falsity" with respect to it at the time of publication. *Hustler Magazine, Inc. v. Falwell*, No. 86-1278, Slip. Op. at 5 (U.S. February 24, 1988); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 335 n.6 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964). As this Court made clear in *New York Times*, a public official such as petitioner cannot carry this burden simply by showing that an employee of the publisher knew that an article was false or acted in reckless disregard of whether it was true or false. Rather, the public official must

clearly and convincingly show that the employee or employees having actual responsibility for the publication of the defamatory piece harbored "actual malice." *New York Times Co. v. Sullivan*, 376 U.S. at 280. Once such a person is found to have "actual malice," his or her employer may be held liable on principles of *respondeat superior*. The courts below correctly held that no such person had the requisite state of mind.

The District Court and the Court of Appeals both properly fulfilled their constitutionally mandated role by critically reexamining the evidence as to the alleged "actual malice" of the publisher's employees having responsibility for the publication of the editorial. This Court has repeatedly held that such an independent review is essential to the protection of free expression. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984). In fact, petitioner's failure of proof was so profound that a court using even a non-First Amendment standard for granting judgment n.o.v. or on appeal would have held that no reasonable jury could have found actual malice on the part of those having responsibility for the publication of the article.

I.

The Courts Below Correctly Applied Settled Principles Of Constitutional Law In Determining That Petitioner Failed To Show "Actual Malice" By Clear And Convincing Proof.

The law is clear that as a public official[2] the plaintiff in this case was required to prove with "convincing clarity," *New York Times Co. v. Sullivan*, 376 U.S. 254, 295-96 (1964), that the editorial was published "with 'actual malice'—that is, [either] with knowledge that it was false," *id.* at 287-88, or with the publisher's "awareness of probable falsity." *St. Amant v.*

---

2 The plaintiff conceded that as a police officer he is a public official. The law to that effect is clear. *E.g.*, *Time, Inc. v. Pape*, 401 U.S. 279, 284 (1971); *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968).

Thompson, 390 U.S. 727, 731 (1968), *quoting Curtis Publishing Co. v. Butts*, 388 U.S. 130, 153 (1967) (opinion of Harlan, J.). "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Id.* at 731.

The obligation of the courts below, then, was to determine whether the corporate defendant published the editorial knowing it was false or while entertaining serious doubts as to its truth. But knowledge as to its falsity or doubt as to truth is a "state of mind." *Herbert v. Lando*, 441 U.S. 153, 160 (1979). And a corporation has no state of mind; only its officers and employees do. The determinative questions before the courts, therefore, became: (1) to whose state of mind does a court look in determining the defendant's "actual malice"? and (2) did the plaintiff establish at all, let alone "with convincing clarity," that those relevant persons in fact did harbor "actual malice" at the time of the editorial's publication?

This Court in *New York Times* answered the first question. In that case, this Court determined that previous *New York Times* articles established the falsity of the allegedly libelous advertisement published by the *Times*. Some—even many—employed by the *Times* knew the advertisement was false. But that was not enough to prove "actual malice" "since [for liability to be established] the state of mind required for actual malice would have to be brought home to the persons in the Times organization having responsibility for the publication of the advertisement." 376 U.S. at 287.

Using this guide, the courts below ruled that as a matter of law the reporter's knowledge could not be imputed to *The Globe* simply because he was acting in the course of his employment when he recounted his version of the arrest. Instead, the courts looked to the evidence to determine who at *The Globe* "ha[d] responsibility," in *New York Times* terminology, for the editorial.

Insofar as a suit based solely on the editorial is concerned, McCoy was not a person who "had responsibility" for publication. As a participant in the arrest, he merely provided information to the newspaper. He did not write an article about the incident, did not know an editorial was contemplated when he first told his story, did not help write the editorial, did not suggest what should be in the editorial, did not know of its contents before it was set in type, and did not participate in the decision to publish it. He acted precisely as would any news source and no more "had responsibility" for the editorial than any one of many sources for an article might. The trial judge and the court of appeals concluded, on undisputed facts, that the persons "having responsibility" for the editorial were the editors who wrote it, decided to publish it, and did publish it. And the courts below therefore properly looked to their state of mind as determinative.

Petitioner confuses the issue when he claims that, because the reporter was an employee of *The Globe*, respondent should be liable for any actionable statements in the editorial under traditional rules of *respondeat superior*. Issues of *respondeat superior* would be raised only if petitioner had sued based on the reporter's conduct—*e.g.*, his statements to his editors—in the scope and course of his employment. Instead, petitioner sued solely on the editorial, trying to impute to the publisher the reporter's alleged knowledge of the falsity of an editorial that he neither prepared nor published. It is that imputation of knowledge from an employee having no responsibility for publication to his employer—not the application of traditional rules of *respondeat superior*, as petitioner claims—that as a matter of law was forbidden by this Court in *New York Times Co. v. Sullivan*.

The application of this Court's holding in *New York Times* by the courts below thus does not conflict with *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245 (1974). In *Cantrell*, this Court allowed a plaintiff to recover against a company whose reporter had made up facts in an article he wrote. Certain descriptions of

the plaintiff in the article were proved to have been fabricated by the reporter; his employer was liable for his writing of the article with "actual malice" on the theory of *respondeat superior*. The distinction between *Cantrell* and this case is determinative: the defendant here, understanding the journalistic risks if not the legal ones, took the reporter off the story immediately upon his personal involvement in it. The reporter did not write the editorial. The normal sort of *respondeat superior* liability for a story written by an involved employee which arose in *Cantrell* therefore never became an issue. Similarly, the issue of imputing knowledge of a reporter to his employer/newspaper never arose in *Cantrell*.

The principles applied by the courts below do not immunize this reporter, other reporters similarly situated or their employers from liability for false and defamatory statements made to others, as petitioner contends. (Petition at 15.) Before any such liability can result, however, those statements must be sued upon so that the appropriate issues of fact and law can be passed upon by the judge and the jury.

By suing on the editorial alone, petitioner raised the issue of the imputation of the reporter's state of mind to the respondent when publishing it. Had the petitioner sued on the basis of the reporter's statements to his superiors, however, the courts below would have been required to focus on the entirely different issue of respondent's liability under *respondeat superior* law for the behavior of the reporter, specifically his alleged libel contained in his statements. *Compare* Restatement (Second) of Agency, Chapter 8, Topic 2, §§ 272-82 (1958) ("Knowledge of Agent") and Seavey, *Agency*, §§ 97-103, pp. 174-187 (1964) *with* Restatement (Second) of Agency, Chapter 7, Topic 2, Title B ("Torts of Servants") and Seavey, *supra*, §§ 82-93, pp. 137-168. The complaint did not raise, and neither of the courts below were called upon to resolve, issues as to the reporter's legal responsibility—and the vicarious liability of the publisher—for the reporter's statements to his editors. Such issues are therefore irrelevant to this petition.

Turning to the state of mind of the publisher's employees who did have responsibility for the editorial, the courts below correctly and necessarily concluded that the evidence at trial, plainly and as a matter of law irrespective of the test on motion for judgment n.o.v. or on appeal, did not establish that the editors responsible for publication did so with "actual malice." It is uncontested that the responsible editors knew and had confidence in the reporter and his work, and had information from the reporter, from an observation of his objective physical condition and medical treatment, from an examination of his damaged camera, from a photographer employed by the newspaper, from another reporter employed by the newspaper who wrote the factual account of the arrest, from telephone callers—all supporting the facts as stated in the editorial. It is also uncontested that neither the plaintiff nor anyone else at the Joplin Police Department had called to claim error in the factual account published two days before the editorial. In no way could that record support a finding by a reasonable jury, by a preponderance of the evidence let alone "with convincing clarity," that the editorial was published with "actual malice." *St. Amant v. Thompson*, 390 U.S. 727 (1968).[3]

---

3 The decisions below are consistent with state court cases with similar facts. *See, e.g., Dupler v. Mansfield Journal Co., Inc.*, 64 Ohio St. 2d 116, 413 N.E.2d 1187, 1193 (1980), *cert. denied*, 452 U.S. 962 (1981) (in action on editorial the facts of which were derived from two previously published news stories, court upheld lower court's reversal of a jury verdict for the plaintiff because author of editorial "had no reason to doubt the accuracy of the statutory interpretations attributed to police in the initial article, nor the accuracy of the article itself"); *Lane v. Arkansas Valley Publishing*, 675 P.2d 747, 752 (Colo. Ct. App. 1983), *cert. denied*, 467 U.S. 1252 (1984) ("[T]o the extent that the comments [in the editorials] allude to a factual basis, because defendants demonstrated that these facts had been the subject of news articles and [the plaintiff] submitted no evidence to the contrary, [the plaintiff] did not sustain his burden of making a prima facie showing that defendants published defamatory falsehoods with reckless disregard"); *Bandelin v. Pietsch*, 98 Idaho 337, 563 P.2d 395, 400, *cert. denied*, 434 U.S. 891 (1977) (no actual malice demonstrated by repetition in good faith of false statements from earlier articles in later ones).

II.

The Courts Below Correctly Followed Principles Established By This Court And Searched The Record For Evidence of Actual Malice.

This Court has explicitly defined the role of judges in libel actions:

> The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice."

Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 511 (1984).

This Court has held that the "convincing clarity" standard is relevant at all stages of a defamation action by a public official, including judgment n.o.v., *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, ___, 106 S. Ct. 2505, 2513 (1986), and on appeal. *Bose v. Consumers Union of U.S., Inc.*, 466 U.S. at 514. The courts below correctly applied this constitutional rule and found that the plaintiff did not prove "actual malice" by clear and convincing evidence.

Petitioner claims that the application of *Bose* by the courts below deprived him of his Seventh Amendment right to a jury trial. (Petition at 7.) This claim confuses what the court below did: "Our obligation is independently to judge whether Speer has established by clear and convincing evidence that the *Globe*'s editorial is not entitled to First Amendment protection in this case." Opinion, Petition at A3. As the court below stated, and as this Court has held, the ultimate issue in a libel case that courts always must examine—whether the speech that

forms the basis of the suit is protected—is a question of law. The court below fulfilled its obligation in a public-official libel case to review all the evidence to make certain that constitutional principles were constitutionally applied. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964). Deciding that question of law does nothing to usurp the function of the jury or to deny petitioner his Seventh Amendment rights.

Petitioner's complaint that his Seventh Amendment rights were violated actually appears to boil down to an argument that the jury might have believed that the *Globe* editors acted with reckless disregard for truth or falsity in not doubting their reporter, McCoy. At the trial, however, petitioner presented no evidence suggesting that the editors had any reason for doubting the reporter's credibility. The courts below did not have to judge the credibility of any witness, therefore, but simply considered petitioner's failure to meet even the most lenient burden of proof, let alone the clear and convincing standard applicable in this public-figure libel action.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: February 27, 1988

Respectfully submitted,

ROBERT D. SACK
Counsel of Record
STUART D. KARLE
GIBSON, DUNN & CRUTCHER
200 Park Avenue
47th Floor
New York, New York 10166
(212) 351-4000

Attorneys for Respondent
Ottaway Newspapers, Inc.

Of Counsel

CHARLES BUCHANAN
1105 East 32nd Street, Suite 5
Post Office Box 1582
Joplin, Missouri 64802
(417) 623-8220